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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1985

HART SCHAFFNER & MARX AND ROOTS, INC.,

Petitioners,

v.

NATURAL FOOTWEAR LIMITED, DON GREEN AND MICHAEL BUDMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BEVERLY W. PATTISHALL
PATRICIA S. SMART
33 West Monroe Street
Chicago, Illinois 60603
(312) 641-1500

WILLIAM J. HELLER
33 Washington Street
Newark, New Jersey 07102
(201) 624-9300
Counsel for Petitioners

Of Counsel:

PATTISHALL, McAULIFFE & HOFSTETTER
33 West Monroe Street
Chicago, Illinois 60603

STRYKER, TAMS & DILL
33 Washington Street
Newark, New Jersey 07102

Merrill/Chicago • 372-2800

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QUESTIONS PRESENTED*

1. Whether the Court of Appeals was correct in changing the long established law that trademark rights are derived from use to a new test requiring proof of "market penetration," in effect denying trademark protection to many smaller enterprises.

2. Whether the Court of Appeals, by engaging in extensive fact-finding, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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*The parties to the proceeding in the court whose judgment is sought to be reviewed are those listed in the caption. The parent company of Hart Schaffner & Marx is Hartmarx Corporation. The only subsidiary of Hart Schaffner & Marx which is not wholly owned is Thorngate S.A. de C.V. The following subsidiaries of Hartmarx Corporation are not wholly-owned: Austin Reed Group P.C., Country Miss, Inc. and Organization Robert's S.A. de C.V. The parent company of Roots, Inc. is Hart Specialty Stores, Inc. which is a wholly-owned subsidiary of Hartmarx Corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Hart Shaffner & Marx and Roots, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 19, 1985.

OPINIONS BELOW

The opinion of the District Court dismissing respondent Natural Footwear Limited's complaint and entering judgment for petitioner Roots, Inc. on its counterclaim is reported at 579 F.Supp. 543 (D.N.J. 1983). The decision by Court of Appeals reversing the District Court, as amended May 31, 1985, is reported at 760 F.2d 1383 (3rd Cir. 1985). The decision by the Court of Appeals denying rehearing on May 30, 1985 is unreported, as is its order amending the opinion dated June 27, 1985.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit reversing the decision of the District Court was entered on April 19, 1985. A timely petition for rehearing was denied on May 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), 15 U.S.C. §1122 and Rule 17.1(a) of the Supreme Court Rules.

STATUTORY PROVISIONS OR RULES INVOLVED

Section 2(d) of the Trademark Laws of the United States (15 U.S.C. 1052(d)):

Sec. 2 (15 U.S.C. 1052) Trademarks registrable on the principal register

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

* * *

(d) consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office or a mark or a trade name previously used in the United States by another and not abandoned, as to be likely, when applied to the goods of the applicant, to cause confusion, or to cause mistake, or to deceive: *Provided*, That when the Commissioner determines that confusion, mistake, or deception is not likely to result from the continued use by more than one person of the same or similar marks under conditions and limitations as to the mode or place of use of the marks or the goods in connection with which such marks are used, concurrent registrations may be issued to such persons when they have become entitled to use such marks as a result of their concurrent lawful use in commerce prior to (i) the earliest of the filing dates of the applications pending or

of any registration issued under this Act; or (ii) July 5, 1947, in the case of registrations previously issued under the Act of March 3, 1881, or February 20, 1905, and continuing in full force and effect on that date; or (iii) July 5, 1947, in case of applications filed under the Act of February 20, 1905, and registered after July 5, 1947. Concurrent registrations may also be issued by the Commissioner when a court of competent jurisdiction has finally determined that more than one person is entitled to use the same or similar marks in commerce. In issuing concurrent registrations, the Commissioner shall prescribe conditions and limitations as to the mode or place of use of the mark or the goods in connection with which such mark is registered to the respective persons;

* * *

Rule 52(a) Federal Rules of Civil Procedure:

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of

motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

1. Nature of the Case and Its Disposition Before the District Court.

This case involves a controversy between Roots and Natural[1] over the right to use the name and mark ROOTS for wearing apparel, including footwear, in the United States.

Roots' founder, Adolph Root, began selling wearing apparel in 1917 in Jersey City (A-1, A-28, A-64). In the 1950's, following relocation of the stores to Summit, New Jersey, Perry Root joined his father's business and changed its focus to cater to discriminating, upper-income customers, instituted Roots' present program of applying permanent woven ROOTS labels to its high-quality wearing apparel and undertook to extend its reputation and sales throughout the United States (A-3, A-28, A-64, A-77). To this end, Roots, *inter alia*, placed mail order advertisements for ROOTS apparel in *The New Yorker*, the national magazine deemed the most suitable for reaching the patrons Roots desired, and established a list of out-of-state customers to whom its ROOTS brochures and catalogs were regularly mailed (A-28, A-65).

As a result of its sales and promotional efforts, Roots established a valuable trade, predominantly in New Jersey, but also across the country (A-66 - A-67, A-77 - A-78). By 1965, Roots' reputation was such that Hart Schaffner & Marx found the business an attractive one for acquisition (A-28, A-77). Following the acquisition, Roots, as a subsidiary, "has carried on the business at the direction of Perry Root ever

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1. In conformity with the practice followed in the opinions below, petitioners Hart Schaffner & Marx and Roots, Inc. are collectively referred to herein as "Roots," and respondents Natural Footwear Limited, Don Green and Michael Budman are collectively referred to herein as "Natural."

since, along the same lines he planned from the start" (A-65). Roots' mail order sales total between a quarter to half a million dollars annually, aggregating millions of dollars over the years, and have constituted a significant and growing part of Roots' business (A-77, Preliminary Injunction Transcript pp. 45-46).

Natural, on the other hand, did not use the trademark ROOTS in the United States until December, 1973, when it shipped footwear from Canada to California (A-35). By that time, Roots had been selling wearing apparel, including footwear, under the name and mark ROOTS for decades, both through its retail stores and mail orders, and had achieved annual sales of approximately four million dollars (A-42, A-80).

Roots learned of Natural's use of ROOTS in 1975 and promptly objected (A-2, A-83). Roots subsequently learned that Natural had registered ROOTS for footwear and instituted a cancellation proceeding in the United States Patent and Trademark Office (A-3). During the pendency of that proceeding, Natural expanded its use of ROOTS by introducing a line of men's clothing under the mark (A-3). Roots objected and Natural filed the present action (A-3). Roots counterclaimed for unfair competition and trademark infringement, and moved for a preliminary injunction (A-1).

Following a three-day hearing, the District Court granted Roots' motion for a preliminary injunction enjoining Natural from expanding its use of ROOTS in the United States to wearing apparel other than footwear. The court found that Roots had used the name and mark ROOTS in connection with the sale of wearing apparel for decades, that the name ROOTS had long been associated with the high-quality wearing apparel sold by Roots to persons throughout the United States, and that Natural's use of ROOTS was an intentional effort to trade on Roots' reputation (A-1 - A-4). The injunction was modified and limited to New Jersey and New York pending appeal (A-8 - A-9, A-10 - A-11). The modification was vacated and the grant of the nationwide injunc-

tion was affirmed by the Third Circuit on March 21, 1980 (A-12 - A-13).

On December 8, 1983, after twenty-two days of trial, the District Court (which had jurisdiction pursuant to 15 U.S.C. 1121, 28 U.S.C. 1332(a), and 28 U.S.C. 1338(a) and (b)) issued final judgment against Natural on the complaint and for Roots on the counterclaim. The court's forty-nine page opinion includes a detailed recitation of the facts, replete with record references. The court found that "from at least May of 1959, more than fourteen years before Natural first shipped shoes to California, Roots was offering its goods nationally by mail" (A-66), and that by the time Natural first used the trademark ROOTS in December 1973, Roots had already established a reputation throughout the United States (A-80):

> Thus, the evidence as a whole clearly and convincingly shows that Roots had established and continues to enjoy unique identification for the wearing apparel (including shoes) sold by it as a merchant, both as a tradename and a trademark, mainly in New Jersey but throughout the United States as well, long before Natural's first shipment of shoes to California in late December, 1973.

Accordingly, the District Court awarded Roots a nationwide injunction against Natural's use of Roots and an accounting of profits from July 1977 forward and ordered cancellation of Natural's registrations.

2. Disposition of the Case by the Court of Appeals for the Third Circuit.

The Court of Appeals reversed, limiting the injunction and accounting of profits granted Roots to New Jersey, reinstating Natural's registrations and remanding for entry of an injunction against Roots as to footwear and for further consideration of the parties' common law rights to use ROOTS for clothing. The court held that because Natural had obtained federal registrations of ROOTS for footwear, Roots

was entitled to relief against Natural's use of ROOTS for footwear only in those areas where it had achieved "market penetration" as of December 1973, the date the Court of Appeals stated (erroneously) that Natural had obtained its registrations (A-117 - A-119). Relying upon its own evaluation of the evidence, the court found that Roots had not proved "market penetration" (A-130). It therefore denied Roots injunctive relief outside New Jersey despite the findings that Roots undisputedly was the prior user and that Roots' sales and use of ROOTS within New York and Pennsylvania were greater than *de minimis* prior to Natural's use or registration of ROOTS (A-130). As to clothing, the court held that Roots was entitled to an injunction in New Jersey, but that it was unable to determine the parties' common law rights to use ROOTS outside New Jersey and remanded for further proceedings on that issue (A-136).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decisions of This Court, Decisions of the Other Circuits and the Centuries Old, Established Principle of Trademark Law as to the Test for Acquiring Protectable Rights in a Trademark.

The decision below prescribes a test, which the court concedes it had not used before (A-119), for determining whether a business has acquired rights in a trademark. This test, which the court refers to as "market penetration", requires consideration of four factors on a state-by-state or region-by-region basis, namely (1) the volume of sales of the trademarked product; (2) growth trends in the area; (3) number of persons actually purchasing the product in relation to the potential number of customers; and (4) amount of product advertising in the area (A-120 - A-122).

This decision conflicts with the decisions of this Court, those of the other circuits, and the previous decisions of the Third Circuit, which have held in accordance with historical precedent since the circuits were established that trademark

rights arise simply from use. This test therefore comprises a radical and fundamental departure from that centuries old principle of Anglo-American law. *Columbia Mill Co.* v. *Alcorn*, 150 U.S. 460, 463-64 (1893); *Trademark Cases*, 100 U.S. 82, 92, 94 (1879); *McLean* v. *Fleming*, 96 U.S. 245, 252 (1877); *Blanchard Importing & Distributing Co.* v. *Charles Gilman & Son, Inc.*, 353 F.2d 400, 401 (1st Cir. 1965); *New England Duplicating Co.* v. *Mendes*, 190 F.2d 415, 417 (1st Cir. 1951); *Blisscraft of Hollywood* v. *United Plastics Co.*, 294 F.2d 694, 700 (2d Cir. 1961); *Wallace & Co.* v. *Repetti, Inc.*, 266 F. 307, 308 (2d Cir. 1920); *Campbell Soup* v. *Armour & Co.*, 175 F.2d 795, 797 (3d Cir. 1949); *Food Fair Stores, Inc.* v. *Lakeland Grocery Corp.*, 301 F.2d 156, 161 (4th Cir. 1962); *Blue Bell, Inc.* v. *Farah Manufacturing Company, Inc.*, 508 F.2d 1260, 1265 (5th Cir. 1975); *Turner* v. *HMH Publishing Co., Inc.*, 380 F.2d 224, 228 (5th Cir. 1967), *cert. denied* 389 U.S. 1006 (1967); *E.F. Prichard Co.* v. *Consumers Brewing Co.*, 136 F.2d 512, 518 (6th Cir. 1943) *cert. denied* 321 U.S. 763 (1944); *Benrose Fabrics Corp.* v. *Rosenstein*, 183 F.2d 355, 359 (7th Cir. 1950); *United States Ozone Co.* v. *United States Ozone Co.*, 62 F.2d 881, 885 (7th Cir. 1932); *Kathreiner's Malzkaffee* v. *Pastor Kneipp Medicine Co.*, 82 F.2d 321, 325 (7th Cir. 1897); *Brown & Bigelow* v. *B & B Pen Co.*, 191 F.2d 939, 942 (8th Cir. 1951); *Sweet Sixteen Co.* v. *Sweet "16" Shop*, 15 F.2d 920, 925 (8th Cir. 1926); *Tillamook County Creamery Ass'n* v. *Tillamook Cheese and Dairy Ass'n*, 345 F.2d 158, 160 (9th Cir. 1965), *cert. denied* 382 U.S. 903 (1965); *Drexel Enterprises, Inc.* v. *Richardson*, 312 F.2d 525, 527 (10th Cir. 1962); *Ph. Schneider Brewing Co.* v. *Century Distilling Co.*, 107 F.2d 669, 703 (10th Cir. 1939); *University of Georgia Ass'n* v. *Laite*, 756 F.2d 1535, 1541 (11th Cir. 1985); *Robertson* v. *United States*, 287 F. 942, 945 (D.C. Cir. 1923); *reversed on other grounds*, 256 U.S. 168 (1924).

To establish rights, the prior user has not been required to prove the substantial volume of business or advertising required under the "market penetration" test. Rather, genuine prior and continuing use greater than *de minimis* use uniformly and historically has sufficed to afford rights pre-

emptive over a subsequent user. *McGregor-Doniger, Inc.* v. *Drizzle, Inc.*, 599 F.2d 1126, 1132 (2d Cir. 1979); *Blue Bell, Inc.* v. *Farah Manufacturing Company, Inc.*, 508 F.2d 1260, 1265 (5th Cir. 1975); *Drexel Enterprises, Inc.* v. *Richardson*, 312 F.2d 525, 527 (10th Cir. 1962); *Sweet Sixteen Co.* v. *Sweet "16" Shop*, 15 F.2d 920, 925 (8th Cir. 1926); *Wallace & Co.* v. *Repetti, Inc.*, 266 F. 307, 308 (2d Cir. 1920) *cert. denied* 254 U.S. 639 (1920); *Kathreiner's Malzkaffee* v. *Pastor Kneipp Med Co.*, 82 F. 321, 326 (7th Cir. 1897); *Waldes* v. *International Mnfrs. Agency*, 237 F. 502, 505 (S.D.N.Y. 1916); *Walter Baker & Co.* v. *Delapenha*, 160 F.746, 749 (C.C.D.N.J. 1908). That a subsequent user achieves greater sales does not denigrate the superiority of the rights of the prior user whether or not the prior user has achieved what the Court of Appeals describes as "market penetration." *Big O Tire Dealers, Inc.* v. *Goodyear Tire and Rubber Co.*, 561 F.2d 1365 (8th Cir. 1977), *cert. denied* 434 U.S. 1052 (1978); *Dwinell-Wright Co.* v. *National Fruit Product Co., Inc.*, 140 F.2d 618, 624 (1st Cir. 1944); *Ansehl* v. *Williams*, 267 F. 9, 12 (8th Cir. 1920). Nor does registration confer upon a subsequent user rights superior to a prior user in the areas where the mark has been used. *Tillamook County Creamery Ass'n* v. *Tillamook Cheese and Dairy Ass'n*, 345 F.2d 158, 160 (9th Cir. 1965); *Robertson* v. *United States*, 287 F. 942, 945 (D.C. Cir. 1923); *Ansehl* v. *Williams*, 267 F. 9, 14 (8th Cir. 1920); 15 U.S.C. §§ 1052(d), 1065, 1115(b)(5).

The Third Circuit now has held that proof of priority of genuine use is not enough. Prior "market penetration" must be shown (A-117-A-119). This test conflicts with the entire body of the law disclosed above and necessarily will deny many small businesses trademark protection. The effect here of the Court of Appeals decision is to deprive Roots of protection for the business and goodwill built up by over thirty years of good faith effort because, under the Third Circuit's test and findings of fact, the business developed simply was not substantial enough. This is the very result the previous case law recognized should not be permitted. As the District Court correctly observed herein, the trademarks of "small

businesses" are as much entitled to protection as those of large companies (A-82):

> Nothing in the common law of trademarks, or in the Lanham Act, limits the protection of the intangibles arising from the use of a well-established and strong mark, such as here, to large enterprises. Small enterprises as well as massive ones are equals in the eyes of the law.

The Third Circuit's extraordinary new test primarily depends upon the size and resources of companies, not their good faith prior use and continuous use of the trademark. Thus, if a business is unable to promote and generate a substantial sales volume, is unable to afford substantial advertising and is unable to maintain significant growth trends, under the Third Circuit's test its rights in its trademark will no longer be protected against later "market penetration" by larger companies with the greater resources needed to achieve "market penetration". Not only is this contrary to established trademark law, but also to the principles of fair competition. As the court stated in *Big O Tire Dealers, Inc.* v. *Goodyear Tire & Rubber,* 408 F.Supp. 1219, 1232 (D. Col. 1976) *aff'd as modified* 561 F.2d 1365 (10th Cir. 1977), *cert. denied* 934 U.S. 1052 (1978):

> While mere difference in size and economic power between competitors is not unfair, the competition becomes unfair if that power is used with a complete disregard of the property rights of the smaller company.

The Third Circuit in its lengthy decision cites only two opinions as support for its test, *Weiner King, Inc.* v. *Weiner King Corp.,* 615 F.2d 512 (C.C.P.A. 1980) and *Sweetarts v.*

Sunline, 380 F.2d 923 (8th Cir. 1967).[2] In *Weiner King*, the court noted that a party could obtain rights in a trademark in territories beyond those where the mark had been used, namely, those territories in which it had become known and functioned to identify and distinguish, and set forth five factors to consider to determine if this had occurred. One method in which a trademark proprietor could obtain rights was where there had been "market penetration" by virtue of customers bringing the trademarked product into areas where it was not sold. The court did not suggest that "market penetration" as prescribed now by the Third Circuit need be shown where prior use or sales had occurred or that a prior trademark proprietor should be deprived of protection for its trademark in those areas. Here, however, despite the Court of Appeals' finding that Roots had greater than *de minimis* use in New York and Pennsylvania, it denied Roots protection because it did not meet the "market penetration" test.[3]

Although the Eighth Circuit used the term "market penetration", in *Sweetarts* v. *Sunline*, 380 F.2d 923 (8th Cir. 1967), it specifically noted that the market penetration need not be large, but simply enough that confusion would be likely should another make use of the trademark. Thus, it is not clear that this decision requires more than greater than *de*

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2. The Third Circuit also bases its test in part on its erroneous holding that 15 U.S.C. 1115(b) is determinative of whether Roots is entitled to protection. Section 1115(b), however, applies only where (1) the nonregistrant adopted its mark after the federal registrant and (2) the registration has become incontestable. It is inapplicable here, where it is undisputed that Roots is the senior user of the mark and that Natural's registrations are not incontestable.

3. Moreover, despite its holding that Roots is entitled to exclusive use of the name and mark ROOTS within New Jersey, the Court of Appeals reinstated Natural's registration, without any restriction. Since Roots is the prior user, however, any registration had by Natural must necessarily exclude those areas where ROOTS has the exclusive right to use the mark. *Weiner King, Inc.* v. *Weiner King Corp.*, 615 F.2d 512 (C.C.P.A. 1980). The proper procedure would have been to order concurrent registrations in accordance with 15 U.S.C. 1052(d), the provisions of which the court seemingly overlooked.

minimis use. *See Truck Equipment Serv. Co.* v. *Fruehauf Corp.*, 536 F.2d 1210, 1221-22 (8th Cir. 1976) *cert. denied* 434 U.S. 1052 (1978). To the extent *Sweetarts* prescribes a test requiring more, it likewise is in conflict with the historically established law and the decisions of the other circuits.

The Third Circuit's "market penetration" test is without benefit of support. The decision conflicts fundamentally with decisions in all other circuits and nullifies *ex post facto* the rights of small businesses that cannot meet the Third Circuit's enlarged standards.

2. By Engaging in Extensive Fact-Finding, the Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call For an Exercise of This Court's Power of Supervision.

In reversing the ruling of the District Court, the Court of Appeals seemingly disregarded the extensive and detailed findings of the trial court. Throughout, the court relies upon its own view of the evidence, consistently substituting its own judgment for that of the District Court as to the interpretation of testimony, the credibility of witnesses and the evaluation of documentary evidence.[4] For example, the Court of Appeals concludes that Natural's experts, Dr. Assael and Steven Osterweiss, "carefully reviewed the evidence" (A-132). It then relies upon their testimony to support its own findings (A-131). This is directly contra to the conclusion of the trial judge who observed the witnesses and found their testimony was "not persuasive" and that their opinions were "no more than casual, off-the-cuff views with not much beyond a superficial exposure to the underlying facts" (A-80 - A-81). Similarly, despite the finding of the District Court that

4. The statement of facts by the Court of Appeals is replete with misstatements of uncontroverted facts: e.g., the date Natural obtained its registration, the number of stores operated by Roots, the number of catalogs containing references to phone or mail orders, the number of catalogs which include mail order forms, and the time period encompassed by the exhibit of ROOTS charge card statements.

the Boiko report (a tabulation of sales slips selected by Natural's counsel as representing Roots' out-of-state sales) corroborated the testimony that Roots had obtained a national reputation (A-77 - A-78), the Court of Appeals, substituting its own interpretation of the documents, found that they supported its finding to the contrary (A-124 - A-125). The Court of Appeals, likewise, makes no mention of the trial court's findings that Natural was aware of Roots since 1975 and that its use of ROOTS was an intentional and deliberate attempt to trade on Roots' reputation (A-83). Instead, the Court of Appeals simply stated it was undisputed that Natural first knew of Roots at least as early as 1977 (A-105 n.16).

Appellate fact-finding is expressly prohibited by Rule 52(a) of the Federal Rules of Civil Procedure and the decisions of this Court. An appellate court may not substitute its own judgment for that of the trial court even though it would have weighed the evidence differently had it been the finder of fact. *Anderson* v. *City of Bessemer City, North Carolina,* ____ U.S. ____, 105 S.Ct. 1504, 1511-12 (1985); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). This is true both as to the evaluations of documentary evidence such as the Boiko report and as to testimony. *Anderson* v. *City of Bessemer City, North Carolina,* 105 S.Ct. at 1512. Especially great deference must be afforded the court's determination regarding the credibility of witnesses who testified before it. *Anderson* v. *City of Bessemer City, North Carolina,* 105 S.Ct. at 1512; *see Wainwright* v. *Witt,* 469 U.S. ____, 105 S.Ct. 844, 854 (1985).

The factual findings by the Court of Appeals literally pervade the opinion (e.g. pp. A-96 - A-109, A-122 - A-132, A-136 - A-138). Such appellate fact-finding undermines the orderly administration of justice, impairs confidence in the decisions of the district courts, and unnecessarily multiplies the number of appeals. *Pendergrass* v. *New York Life Ins. Co.*, 181 F.2d 136, 138 (8th Cir. 1950). The unfairness resulting to litigants was very recently stressed and explained by

this Court in *Anderson* v. *City of Bessemer City, North Carolina*, ____ U.S. ____, 105 S.Ct., 1504, 1512 (1985) as follows:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'" *Wainwright* v. *Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). For these reasons, review of factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

Even were it correctly found that the District Court failed to apply the proper legal standard, the Court of Appeals' fact-finding severely departs from the accepted and usual course of judicial proceedings. Where a district court fails to make findings because it applied an incorrect legal standard, a remand for such findings is the proper remedy, not the rendering of findings. *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 322 (1974); *DeMarco* v. *United States*, 415 U.S. 450, 451 (1974). As stated in *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291 (1982):

> When an appellate court discerns that a district court has failed to make a finding because of an

erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings:

> Fact finding is the basic responsibility of district courts, rather than appellate courts, and ... the court of appeals should not have resolved in the first instance this factual dispute which had not been considered by the district court. DeMarco v. United States, 415 U.S. 449, 450 (1974).

Especially is this true where, as here, the court of appeals has enunciated a new test placing a more onerous burden of proof on the litigants. *E.g. Pavlides* v. *Galveston Yacht Basin, Inc.*, 727 F.2d 330, 340 (5th Cir. 1984); *Pennington* v. *Lexington School District 2*, 578 F.2d 546, 549 (4th Cir. 1978); *Love* v. *Waukesha Joint School Dist. No. 1, Bd. of Ed.*, 560 F.2d 285 (7th Cir. 1977); *Chicano Police Officer's Ass'n* v. *Stover*, 552 F.2d 918, 921 (10th Cir. 1977); *Thompson* v. *Madison County Bd. of Educ.*, 496 F.2d 682 (5th Cir. 1974); *Fulton National Bank* v. *Tate*, 363 F.2d 562 (5th Cir. 1966).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BEVERLY W. PATTISHALL
PATRICIA S. SMART
33 West Monroe Street
Chicago, Illinois 60603
(312) 641-1500
WILLIAM J. HELLER
33 Washington Street
Newark, New Jersey 07102
(201) 624-9300
Counsel for Petitioners

Of Counsel:
PATTISHALL, McAULIFFE & HOFSTETTER
33 West Monroe Street
Chicago, Illinois 60603
STRYKER, TAMS & DILL
33 Washington Street
Newark, New Jersey 07102